UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION OF NON-PARTIES WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY TO QUASH THE SUBPOENA ISSUED TO JOSEPH HANDRICK

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011 JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

On November 25, faced with a motion to compel, defendants listed Joseph Handrick as a potential witness under Rule 26. The legislative leadership, like Mr. Handrick not a party, has now moved to prevent plaintiffs from deposing him.[1] The panel here has urged counsel to note any precedent set in the similar case in the Northern District of Illinois. That panel, in a well-reasoned decision, recognized that the discovery sought here is permissible and that the involvement of private consultants waives legislative privilege. The blanket claims of privilege and irrelevance made here ignore that precedent. They are part of a shell game that should cease.

A. The Discovery Sought By Plaintiffs Is Relevant.

The legislature moves to quash the subpoena on relevance grounds. Plaintiffs challenge the legislative boundaries, in part, under the Voting Rights Act and the Fourteenth Amendment: the legislature formed fewer assembly districts with an African-American voting-age majority than it could have and failed to establish *any* minority-majority district for Latino voters. "Proof of racially discriminatory intent or purpose," which "is required to show a violation of the Equal

[1] Plaintiffs have also served subpoenas on legislative staff and anticipate that the legislature will either move to quash or serve objections to those subpoenas as well. Plaintiffs have already received a letter objection to one subpoena.

Protection Clause," demands "a sensitive inquiry into such circumstantial *and direct evidence* of intent as may be available." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (emphasis added). "Proof of discriminatory intent is ... sufficient, though not necessary, to sustain" a Voting Rights Act claim. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-5065, 2011 U.S. Dist. LEXIS 117656, at *11 (N.D. Ill. Oct. 12, 2011). Regardless of the available circumstantial evidence, direct evidence is clearly relevant. *Id.* at *15. The legislature's intent and how it implemented its goals are not "legally immaterial," as the legislature contends, Mot. (Dkt. 63) at 3; they are a central issue.

B. The Subpoena Does Not Seek Privileged Information.

Mr. Handrick is a lobbyist; he is not a lawyer. The legislature argues, with scant justification, that the information sought by the subpoena of Mr. Handrick is privileged. That Mr. Handrick "assisted [private] counsel for the Senate and Assembly in the provision of legal advice"—whatever that means—does not make his testimony or documents "privileged and not subject to production." Mot. (Dkt. 63) at 2.

The legislature never specifies the privilege it asserts, failing to sustain its burden of showing the application of *any* privilege. The legislature cannot claim a privilege-by-association simply because the majority found it necessary to hire two private law firms with which Mr. Handrick worked in some way to some unspecified degree.

The attorney-client privilege protects "communications made in confidence by a client and a client's employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice." *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2009). As a private consultant, Mr. Handrick helped draw the maps later codified as Acts 43 and 44. "If what is sought is not legal advice but only [consulting] service ... or if the advice sought is the [consultant's] ... no privilege exists." *In re Grand Jury Proc.*, 220 F.3d 568, 571 (7th Cir. 2000).

These standards cannot be applied to the sweeping assertions of privilege here. Privilege "cannot be a blanket claim; it must be made and sustained on a question-by-question or document-by-document basis." *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). Rule 45(d)(2)(A) requires this. The legislature cannot flout this standard to try to shield itself from discovery. The attorney-client privilege "is in derogation of the search for the truth and, therefore, must be strictly confined." *In re Grand Jury Proc.*, 220 F.3d at 571.

Any claim of *legislative* privilege must also fail. A *qualified* legislative privilege that "protects [lawmakers] from producing documents in certain cases" may "be overcome by a showing of need." *Comm. for a Fair & Balanced Map*, 2011 U.S. Dist. LEXIS 117656, at *24-25. To the extent the state legislators "relied on reports or recommendations generated by outside consultants to draft" the district maps, "they waived their legislative privilege as to [those] documents." *Id.* at *35. The legislature waived any privilege by consulting Mr. Handrick. Even absent that hurdle, four out of five legislative privilege factors—relevance, availability of other evidence, seriousness of issues, and the government's role—support disclosure. *Id.* at *25. Only the potentially chilling effect on legislators weighs the other way. "[T]he need for disclosure and accurate fact finding" clearly "outweighs the legislature's need to act free of worry about inquiry into its deliberations." *Id.* at *25-26.

C. Mr. Handrick Is A Fact Witness, Not A Non-Testifying Expert.

Mr. Handrick is not a "retained, non-testifying expert." Mot. (Dkt. 63) at 2. Although a party's ability to depose a consulting expert "retained or specially employed by another *party* in anticipation of litigation or to prepare for trial" is limited, Fed. R. Civ. P. 26(b)(4)(D), Mr. Handrick is a *fact* witness in possession of discoverable information—disclosed, belatedly, under Rule 26—as a contractor who helped draw the district boundaries in Acts 43 and 44. He was not retained in anticipation of litigation; indeed, he is not—and was not—even employed by any party, or by, notably, the legislature that has moved to quash the subpoena.

D. Other Objections Are Moot Or Will Be Cured.

Only documents in a person's "possession, custody, or control" can be sought by subpoena. Fed. R. Civ. P. 45(a)(1)(A). That limitation is implicit in the document requests to Mr. Handrick, but plaintiffs agree to modify the subpoena to make that explicit. Moreover, without deposing Mr. Handrick, they cannot even determine which documents even exist.

The recording method—by video—was inadvertently omitted. If this Court does not modify the subpoena, plaintiffs will reissue it. Plaintiffs contend that the timing for compliance was reasonable, particularly in light of the expedited schedule, and the motion to quash makes this objection moot. In this regard, plaintiffs ask this Court to order counsel to the legislature to accept service on behalf of its staff and consultants. Discovery should not be delayed because witnesses within the legislature's influence refuse to be promptly served.

Dated: December 6, 2011.

GODFREY & KAHN, S.C.

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